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AUTOMOTIVE MACHINISTS LODGE 1173

8 UNITED STATES OF AMERICA
9 BEFORE THE NATIONAL LABOR RELATIONS BOARD

11 FAIRFIELD IMPORTS, LLC d/b/a
12 FAIRFIELD TOYOTA, MOMENTUM
13 AUTOGROUP and MOMENTUM TOYOTA
OF FAIRFIELD,

Case Nos. 20-CA-035259;
20-CA-070368;
20-CA-088332;
20-CA-106248

14 Respondent,

15 And

16 AUTOMOTIVE MACHINISTS LOCAL
17 LODGE NO. 1173, DISTRICT LODGE 190,
18 INTERNATIONAL ASSOCIATION OF
19 MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO

20 Charging Party.

**REPLY TO RESPONDENTS'
ANSWERING BRIEF**

22 1. Fairfield Imports is correct in one regard. Several of the cases we relied upon are
23 victims of *Noel Canning*. The reasoning of each of those cases is still applicable. See, e.g., *Alan*
24 *Ritchey, Inc.*, 359 NLRB No. 40 (2012) and *American Baptist Home of the West*, 359 NLRB No.
25 46 (2012). We expect that the current Board will reissue decisions reaffirming those decisions or
26 adopting those rules in subsequent cases or in this case.

27 2. The Union is entitled to seek broader remedies than sought by the General
28 Counsel. Respondent is correct that many of our exceptions relate to the narrowness and

1 inadequacy of the remedy. We have certainly not changed the General Counsel's theory of the
2 case. We have adopted the General Counsel's theory and sought additional remedies.

3 3. The confidentiality agreement is overbroad. The Board's recent decision in
4 *Macy's*, 361 NLRB No, 4 (2014 illustrates the problem caused by this language. In this
5 representation case much of the information which the Union needed to determine the scope of
6 the unit would have been confidential under Fairfield Toyota's confidentiality policy.
7 Employees could not have disclosed to the Union the critical information necessary for
8 determining the scope of the unit for organizing purposes. This is exactly why this
9 confidentiality provision is overbroad. See also *KLB Industries*, 357 NLRB No 8 (2011),
10 enforced, 700 F 3d 551 (D. C. Cir 2012)(union entitled to information about competitiveness and
11 competition). Much business information has an impact on working conditions. Employer
12 cannot interfere with the need to provide that information to a bargaining representative or other
13 employees for mutual aid or protection.

14 4. Our attack on the lawful arbitration agreement goes beyond *D.R. Horton*, 357
15 NLRB No. 184 (2012). We also note that *D. R. Horton* was not a case subject to *Noel Canning*
16 because neither members Bloch, Griffin or Flynn sat on the panel which decided the case. In
17 any case as we have pointed out there are additional reasons to find the policy invalid. It is
18 particularly invalid now that the Supreme Court of California has ruled in the *Iskanian v. CLS*
19 *Transportation*, 59 Cal. 4th 358 (2014) that employers cannot lawfully require employees to
20 waive their right to bring representative claims under California's the Private Attorney General's
21 Act. Because Fairfield Toyota's arbitration agreement purports to waive that right prohibited by
22 state law it is unlawful.

23 5. The tire policy was changed. Although we didn't provide a citation in support of
24 our exception, the principle is so obvious that we thought it not necessary. See, *Scepter, Inc. v.*
25 *NLRB*, 280 F.3d 1053 (D.C. Cir. 2002) (new work rule unlawfully implemented where the new
26 work rule converted an informal policy into a hard and fast rule). Fairfield Toyota provides no
27 authority for its claim that the change in enforcement of the policy did not violate the Act,
28 Here, the evidence shows that there was a policy of allowing the employees to take home the

1 used tires because they were always given permission. When the employer stopped giving
2 permission, it was a unilateral change. The employer did not meet its burden or proving that it
3 had exercised any discretion to deny such requests.

4 6. With respect to the alternative work week, Fairfield Toyota claims that there was
5 no evidence of the absence of an election in the record of an election. The burden is on the
6 employer to justify the exception to the requirement to pay overtime after 8. Toyota has the
7 burden of proving an election. If the employer's position is accurate then the alternative work
8 week implementation was unlawful. California law requires an election. The Reply Brief
9 ignores the thrust of this argument which is that the employer engaged in direct dealing by
10 conducting the election. If the employer is claiming that there was no election, then the
11 alternative work week is unlawful and the employer owes a substantial amount of overtime to
12 the employees. The issue is that the employer simply cannot conduct the election in the face of
13 the Union.

14 CONCLUSION

15 For the reasons stated in our Exceptions and in this Reply Brief, those Exceptions should
16 be granted notwithstanding Fairfield Toyota's desperate attempt to avoid them.

17
18 Dated: July 28, 2014

Respectfully submitted,

19 WEINBERG, ROGER & ROSENFELD
20 A Professional Corporation

21 By: /S/ DAVID A. ROSENFELD
22 DAVID A. ROSENFELD
Attorneys for Charging Party
AUTOMOTIVE MACHINISTS LODGE 1173

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1 **CERTIFICATE OF SERVICE**

2 I am a citizen of the United States and an employee in the County of Alameda, State of
3 California. I am over the age of eighteen years and not a party to the withing action; my business
4 address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501. I certify that on
5 July 28, 2014, the **REPLY TO RESPONDENTS' ANSWERING BRIEF** document was served
6 on the following parties as addressed below:

- 7
- 8 ☒ (BY U.S. MAIL) I am personally and readily familiar with the business practice of
9 Weinberg, Roger & Rosenfeld for collection and processing of correspondence for
10 mailing with the United States Parcel Service, and I caused such envelope(s) with
11 postage thereon fully prepaid to be placed in the United States Postal Service at
12 Alameda, California.
- 13 ☒ (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy
14 through Weinberg, Roger & Rosenfeld's electronic mail system to the email addresses
15 set forth below.

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24 I certify under penalty of perjury that the above is true and correct.

25 Executed at Alameda, California, on July 28, 2014.

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27
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/s/KATRINA SHAW
KATRINA SHAW